JD–99-03
Columbus, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE PAINTING COMPANY

and

TRI-STATE BUILDING & CONSTRUCTION TRADES COUNCIL, AFFILIATED WITH NATIONAL BUILDING & CONSTRUCTION TRADES DEPARTMENT, AFL–CIO–CLC

Cases 9–CA–33482
9–CA–33674
9–CA–33665-1-2
9–CA–33723-1-2

Mark Mehas, Esq., for the General Counsel.
William C. Moul, Esq., and *Craig Pederri, Esq.*,
(*Thompson Hine LLP*), Columbus, Ohio,
for the Respondent.

DECISION

Statement of the Case

JOSEPH GONTRAM, Administrative Law Judge. This backpay case was tried in Columbus, Ohio on May 19 and 20, 2003. On March 23, 2000, the Board issued its Decision and Order finding that the Respondent (or TPC) had violated Section 8(a)(1) and (3) of the National Labor Relations Act. The Board ordered the Respondent to make whole certain employees, including Charles Crisp, Warren Hull, Robert Meade, and Mark Pratt, for losses resulting from the Respondent's discharge of these employees in violation of the Act. *The Painting Co.*, 330 NLRB 1000 (2000).[1] On February 6, 2002, the United States Court of Appeals for the Sixth Circuit entered a Judgment enforcing the Board's Order. *The Painting Co. v. NLRB*, 298 F.3d 492 (6th Cir. 2002). A controversy having arisen over the amount of backpay due to the discriminatees under the terms of the Board's Order, the Acting Regional Director for Region 9 of the Board issued a compliance specification and notice of hearing on January 16, 2003. The issues in this backpay proceeding are (1) whether the General Counsel's method of calculating the backpay obligation is unreasonable or arbitrary, and (2) when does the backpay period end.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] The Respondent concedes that the backpay sought in the compliance specification for unlawfully discharged employees David Dunn and Rena Lawson is correct. Accordingly, an appropriate order will be entered.

Findings of Fact

I. The Underlying Unfair Labor Practices Case

The Respondent is a painting contractor headquartered in Plain City, Ohio. It is wholly owned by three brothers: Jeff, David, and Terry Asman. TPC generally employs about 30 painters, although its work force fluctuates between 10 and 50 painters. Crisp, Hull, Meade, and Pratt started working for TPC at its Franklin Furnace job on December 4, 1995 as journeyman painters. The Respondent notified them on January 2, 1996 that they were fired, and their last day of employment with TPC was December 29, 1995. The Board affirmed the finding and conclusion of the Administrative Law Judge that they were discharged in violation of the Act, and it ordered TPC to offer them reinstatement and make them whole.

In his decision, the administrative law judge found that the Respondent presented "a demonstrably false explanation for the termination of the employment of four employees [the discriminatees herein] who actively supported the Union." The judge specifically discredited David Asman's testimony that the discriminatees were discharged because they were substandard workers who were not well suited for the Franklin Furnace job. 330 NLRB at 1011. The judge also found that the Respondent did not have a policy of replacing current employees based on seniority.

The Board's Order in this case directs the Respondent to offer the discriminatees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, and to make the discriminatees whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement. 330 NLRB at 1014–1015.

II. General Counsel's Backpay Calculation

Jon Grove, compliance officer for Region 9 of the Board, computed the backpay and described the bases for his calculations. The data he used in making his computations were obtained from the Respondent's records. The computations themselves are reflected in the appendices to the compliance specification.[2] The compliance officer used a backpay period of January 2, 1996 to April 1, 2002. The backpay calculations are based on Formula Two of the Board's Casehandling Manual-Compliance Proceedings, § 10532.3, which uses the earnings of comparable employees to calculate the lost earnings of discriminatees. The Respondent agrees that Formula Two is the correct method of calculating the backpay in this case.

Because the backpay period lasted for more than 5 years, and because few of the Respondent's painters worked for the Respondent throughout those years, the compliance officer extrapolated yearly earnings from the actual earnings of the painters who did not work a

[2] At the hearing, the Respondent produced additional records resulting in slightly revised backpay calculations. The parties have submitted these revised calculations in a joint stipulation, together with appendices 1-4. The Respondent does not dispute the mathematical calculations, but does dispute the theory on which the calculations were made, as well as the General Counsel's contention that it owes the amounts set forth in the joint stipulation. The General Counsel's calculations as set forth in the joint stipulation and appendices are used throughout this decision, rather than the calculations set forth in the original compliance specification.

full calendar year. (The actual annual earnings were used for all painters who worked a full calendar year. For the years 1996 through 2001, there were 5, 5, 8, 6, 8, and 12 painters, respectively, who worked the entire year.) The method by which such yearly earnings were extrapolated was as follows: each applicable employee's actual earnings were divided by the number of days the employee worked to arrive at an average daily wage. This daily average was multiplied by 365 to arrive at a yearly wage. The yearly wages for all painters were then added, and divided by the number of painters, to arrive at an average yearly wage.[3]

The compliance officer checked the reliability of his extrapolation method by comparing the average actual wages of the painters who worked a full year against the extrapolated wages for the other painters. In 1996, the average actual wages of the painters who worked a full year was $35,348. The extrapolated wages for the employees who worked less than a full year was $34,409. This comparison shows that the extrapolated wages were sufficiently close to the actual wages to be reliable. Moreover, because the extrapolated wages were less than the actual wages, the extrapolation method likely benefited the Respondent by reducing the average wage on which backpay was calculated.

The Respondent objects to this calculation method and maintains that the earnings of the Respondent's painters should not be extrapolated to calculate backpay, but that only actual, unextrapolated earnings should be used. The actual, unextrapolated wages of its painters was much less than the yearly earnings calculated under the extrapolation method. For example, the actual average earnings of the Respondent's painters for 1996 was $7,583, whereas their extrapolated earnings were $34,409. The obvious explanation for this difference is that most of the Respondent's painters worked for the Respondent for much less than a full year. But the compliance officer calculated lost wages for the full years of 1996 to 2001, plus the first quarter of 2002. Where a discriminatee has been denied earnings for a full year, one does not calculate his lost earnings based on 2 or 3 months of work, but on 12 months of work. And in determining a discriminatee's lost earnings for a full year, it is proper and necessary to use the earnings and the extrapolated earnings of comparable employees for the full year.

Similar reasoning would apply to any period of time for which backpay is being calculated. Thus, if only one quarter of a year were involved, one would not use as comparative earnings the wages of employees who worked for only 1 month. The earnings of such employees could either be excluded from the calculations or, if there were many such employees, the properly comparable earnings would be extrapolated to arrive at yearly earnings and then reduced to quarterly earnings.

In the present case, many of the Respondent's painters worked for periods substantially less than 1 year. Accordingly, it was proper to include the wages of these employees and to extrapolate the wages these employees would have earned if they had worked for the entire year. In the alternative, the compliance officer could have excluded all painters who worked for periods of less than 1 year and used, instead, only the actual earnings of painters who worked for each full year. As noted above, this would have resulted in a higher backpay obligation, something the Respondent does not seek and the General Counsel does not advocate. However, it would not be proper to adopt the Respondent's argument and to use directly, without extrapolation, the earnings of workers who worked 1, 2, and 3 months as comparable

[3] Consistent with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), this yearly wage was divided by four to arrive at quarterly earnings. The Respondent does not specifically challenge this proper use and calculation of quarterly earnings, except for the use of the extrapolated yearly earnings described above.

absolute earnings for backpay periods greatly exceeding 1, 2, and 3 months. To use a trite but applicable phrase, the Respondent's contention would compare apples with oranges. The General Counsel's method compares apples with apples.

The Respondent also contends that even if the calculation of backpay were to include extrapolated yearly wages, a multiplier of 260 rather than 365 should be used because its painters did not often work weekends and the former figure excludes all weekends. Nevertheless, the Respondent's painters did work some weekends, and to exclude all weekends from the calculation would lead to the same, possible imprecision as the inclusion of all weekends. The Respondent has not demonstrated that a multiplier of 260 would lead to a more reliable figure than a multiplier of 365. In the end, the reliability and accuracy of the extrapolation method used by the government is demonstrated, as noted above, by the closely comparable amounts between the actual and the extrapolated earnings.

The Respondent's objection to the government's backpay calculation is primarily based on its objection to the backpay period of approximately 5-1/2 years. Recognizing this helps to explain the inapt comparisons asserted by the Respondent. For example, the Respondent's contention that actual, rather than extrapolated, earnings of its painters is the proper measure for backpay might be defensible if, but only if, the Respondent also proves that the discriminatees would have worked the same amount of time as the average time worked by its other painters. Accordingly, I will now turn to the calculation of the backpay period.

III. The Backpay Period

The parties agree that the backpay period begins on January 2, 1996. The question is, when does the backpay period end?

By identical letters dated July 3, 2000, the Respondent advised each of the discriminatees, "The Painting Company currently has positions available for painters as advertised in the Columbus Dispatch and the Orlando Sentinel newspapers. If you are interested in employment with The Painting Company, please respond by phone. . . by fax. . . or by mail. . . . Your response is requested by July 7, 2000 and 5:00 p.m. as we will be filling these positions as soon as possible."[4]

Although the letters to these discriminatees were dated July 3, the envelopes bear postmarks of July 5. Pratt testified that he received the letter on July 5, and that he telephoned the Respondent on the date he received the letter, which was also the date the letter directed him to call the Respondent. (Pratt was apparently confused about this date because the letter directed him to call the Respondent no later than July 7.) As soon as Pratt received the letter, he telephoned the Respondent and talked to David Asman. He asked Asman what he would be paid, and Asman told him between $7 and $8 an hour. Pratt then asked if Asman had any prevailing wage jobs. Asman replied yes, but they were full and he could not offer Pratt a job at the prevailing wage. The Respondent had paid Pratt and the other discriminatees $19.12 an hour on the job from which they had been unlawfully fired in 1996.[5]

David Asman testified that his telephone conversation with Pratt occurred on July 17, 2000, and that in this telephone conversation, he offered to pay Pratt $14.50 per hour, which was allegedly consistent with what the Respondent was paying on its jobs at the time. I do not

[4] GC Exh. 3.
[5] R Exh. 8

credit this testimony because I find that Asman was confused about the date of the conversation and what letter the conversation was in response to. The Respondent was paying its painters $14.50 per hour in 2001,[6] not in 2000 when the conversation allegedly occurred. In fact, the Respondent did offer to pay Pratt and the other discriminatees $14.50 per hour in its 2002 letter to them. But since the Respondent's own records show that it was not paying its painters this hourly wage in 2000, I find that Asman was not credible when he testified that on July 17, 2000, he offered to pay Pratt $14.50 per hour.

Charles Crisp received his letter on July 8, 2000. The deadline set forth in the letter for contacting the Respondent had already passed by the time he received the letter. Accordingly, he did not contact the Respondent after he received it.

By identical letters dated April 1, 2002, the Respondent offered to reinstate each of the discriminatees to their former jobs as journeyman painters.[7] As noted above, these letters listed a starting wage of $14.50 per hour, the existing average wage paid to its painters.[8] The letters listed a specific job to which the discriminatees would be assigned, and they were allowed a reasonable time of 30 days within which to respond.

The Respondent contends that backpay should end at the conclusion of, or shortly after, the job from which the discriminatees were fired, the Franklin Furnace job, because the discriminatees would not have been transferred to any of the Respondent's other jobs. The Franklin Furnace job ended on March 17, 1996, and the Respondent contends that there was no likelihood that the discriminatees would have been transferred or reassigned after the conclusion of that first and only job they worked for the Respondent.[9]

a. *Transfer or reassignment*

The Respondent has a permanent core of painters who remain with the Respondent over various periods of time and who are transferred or reassigned from job to job. There are a large number of transfers and a large number of painters who transfer to different jobs. For example, on December 31, 1995, there were 34 painters, excluding the discriminatees, working for the Respondent.[10] During 1996, the Respondent transferred 29 of these painters to other jobs from the job on which each of the painters started.[11] Moreover, the Respondent transferred these painters 174 times in 1996, an average of 6 transfers per painter.

On the other hand, about 5 painters, representing about 5 percent of the Respondent's work force in 1996, worked the entire year, and these painters were generally from the Columbus-Central Ohio area.[12] These numbers remained the same in 1997. In 1998, 8

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[6] R Exhs. 5 and 14.

[7] GC Exh. 2.

[8] R Exh. 14.

[9] Alternatively, the Respondent contends that the July 17, 2000 letters to the discriminatees were valid and proper offers of reinstatement and that backpay should not extend beyond July 17, 2000. The letters were described above and the contention is considered in the analysis section below.

[10] R Exh. 2.

[11] These transfer records only tracked the transfers of workers who were working on December 31, 1995 and do not include the record of transfers for painters hired after the first of the year.

[12] R Exh. 9, p. 4; R Exh. 18.

painters, representing 12.3 percent of the Respondent's work force; in 1999, 6 painters, or 6.7 percent of the Respondent's work force; in 2000, 8 painters, or 8.5 percent of the Respondent's work force; and in 2001, 12 painters, or 16.2 percent of the Respondent's work force, worked the entire year.

Just as all of the Respondent's painters frequently transfer to other jobs of the Respondent, the painters who worked on the Franklin Furnace job also transferred with regularity. There were 19 painters who worked on the Franklin Furnace job, excluding the discriminatees, and 11 of these painters transferred to other jobs of the Respondent. All of these painters were transferred to the Respondent's other jobs after the termination of the Franklin Furnace job, and there were three painters who each were transferred to more than 20 jobs.[13]

If one of the Respondent's painters becomes unemployed for any reason, the Respondent does not contact that painter when another job for which the painter is qualified becomes available. Rather, in order for that painter to be rehired, the painter is generally required to contact the Respondent. When the Respondent recruits painters for any job, it primarily advertises in the *Columbus Dispatch* newspaper. While this recruitment practice did not limit the number or residences of the painters who were eligible to work for the Respondent, it did result in most of the Respondent's painters being from the Central Ohio area.

When the Respondent worked on projects outside of the Central Ohio area, it generally used painters who were hired from its Columbus, Ohio office. And, when local painters were hired for such projects, these workers rarely stayed on to work other jobs for the Respondent in the Central Ohio area.[14] But these statistics, like other evidence presented by the Respondent, only show that some painters from other areas chose not to work on the Respondent's other projects or not to transfer to other projects of the Respondent. The statistics do not show that the discriminatees were in similar circumstances as these other workers or would have made the same choice as these other workers.

The Respondent was working on at least 3, and possibly as many as 17 different projects during the same time that it was also working on the Franklin Furnace job.[15] One of these jobs was in Florida and one was in Tennessee. The remaining projects were in Ohio. All of the jobs, but especially the Ohio jobs, were, at least potentially, projects to which the discriminatees could have transferred. Moreover, the Respondent told the discriminatees, before they were unlawfully fired, that the Respondent had plenty of work and that if they did a good job, the Respondent could and would keep them working. The Respondent also told the discriminatees that it had weekend work for them and that it always had prevailing wage work. No one at the Respondent ever told the discriminatees that they were not qualified to do certain painting work.

The Respondent asserts there is little or no likelihood that the discriminatees would have been transferred to another of the Respondent's projects during or after the completion of the Franklin Furnace project. The evidence does not support this assertion. First, there were jobs to which the discriminatees could have transferred. Second, 11 of the 19 painters who worked on the Franklin Furnace job did transfer to other projects of the Respondent from the Franklin

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[13] R Exh. 7.

[14] See R Exh. 11.

[15] R Exh. 10. In spite of the beginning and ending dates for the jobs as listed in this exhibit, the Respondent was working on these jobs at the same time as it was working on the Franklin Furnace job. (Tr. 168.)

Furnace job. Third, the Respondent did not transfer employees based on seniority, so the fact that the discriminatees had recently been hired in December 1995 would not have adversely affected their transfer opportunities. Fourth, the Respondent told the discriminatees that it had plenty of work and could keep them working.

Asman testified that the discriminatees were poor workers and if they had been able to perform the work they were hired to perform, they would not have been discharged.[16] The Respondent made this same claim before Administrative Law Judge Stephen Gross. Judge Gross found the claim incredible and concluded that the Respondent did indeed fire the discriminatees because of unlawful discrimination. I am bound by the finding of Judge Gross, but if I were not, I would similarly and independently find that Asman's assertion is not credible. Asman is the vice president of TPC, and his duties are limited to estimating jobs. He finds jobs from reports and he estimates jobs from blueprints or from visiting the sites. There is no evidence that Asman supervises the painters or has any firsthand knowledge of the painters' abilities. Moreover, there is no evidence in the present case that Asman was told by anyone else about the capabilities of the discriminatees. In addition, Asman acknowledged that the discriminatees were qualified to do architectural painting and he further acknowledged that the majority of TPC's jobs involve architectural painting. Accordingly, the Respondent's contention that the discriminatees were poor workers and that the jobs to which they could be transferred were limited because they were poor workers is not credible and is rejected.

Pratt and Crisp testified at the compliance hearing. Pratt prefers to work within a 2-hour drive from his home in Kentucky. Columbus is approximately 120 miles from Pratt's residence. He was prepared to continue his work for the Respondent, including making "trips up here to Columbus, you know, to do some painting up here, and you know, I thought I had me a pretty good job at the time."[17] Crisp did not state any preference for working close to his residence, although he has frequently worked for an employer in Louisville, Kentucky. Also, Crisp failed to apply for a job with a prospective employer, BCI Construction and Engineering, Ltd., and noted on the state unemployment compensation form that the company "would hire for out of state work."[18] The evidence does not disclose the type of work involved or the state in which this prospective job was located.

The Respondent claims that there is little likelihood the discriminatees would have accepted work in the Columbus area at the end of the Franklin Furnace job. I find the evidence supports the opposite conclusion. Columbus is within the general area Pratt prefers to work. Moreover, the locations of jobs he has held since the Respondent fired him shows that he is willing to travel as far as Indiana and Georgia for work. He was willing to work in the Columbus, Ohio area and was looking forward to it. The locations of the jobs held by Crisp after the Respondent fired him were in such out-of-state places as Indiana and Illinois, and in other locations in Ohio such as Cincinnati, Portsmouth, Long Bottom, Chesapeake, and Cleveland.[19] Interim jobs held by Meade were in Illinois, Kentucky, and Ohio.[20] I find there is a substantial

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[16] Tr. 226.

[17] Tr. 267.

[18] The Respondent states in its brief that Crisp "specified, in writing, that he was not interested in 'out-of-state' work. (See R Exh. 22)." This statement misrepresents what is contained in that exhibit. Counsel would do better to check the accuracy of the statements made in its brief before it is sent to the Board for filing.

[19] See Joint Stipulation, App. 1.

[20] See Joint Stipulation, App. 3.

likelihood that the discriminatees would have accepted work from the Respondent in the Columbus area.

The Respondent claims that the work history of Pratt and Crisp after their discharge shows that they both changed employers with frequency. The Respondent argues that an inference should be drawn from these work patterns that the discriminatees would not have remained long with the Respondent even if they had not been fired. This contention is rejected. It is not at all clear that if the Respondent had not fired the discriminatees, their work histories since that date would be the same as they in fact turned out. The Respondent's argument fails to account for or even consider the central employment experience of the discriminatees during the backpay period of time—their unlawful discharge by the Respondent. It simply does not follow that a discriminatee's employment history and experience would have been the same without regard to his unlawful discharge by the Respondent. Moreover, the Respondent's discharge of the discriminatees was the event that started the process and caused them to seek other employment in the first place. For all of these reasons, I do not infer from the discriminatees' actual employment histories after discharge that their employment histories would have been similar or the same in the absence of such discharge.

The Respondent claims that its total employment of painters was reduced to six in mid-July 1996, and that none of these painters were from outside Central Ohio. The Respondent argues from these figures that, "It is a mathematical certainty that they [the discriminatees] would not have worked beyond mid-May, 1996, at any location."[21] The reasoning that is used to arrive at this conclusion is simply fallacious. Moreover, the Respondent fails to address the fact that it did not hire or fire painters based on their residence. If, at any one or more times, all of the Respondent's painters resided in Central Ohio, this was primarily a result of where the Respondent advertised for painters (viz., the *Columbus Dispatch*), and was not the result of any design on its part to employ only or primarily painters with such residences. Thus, the likelihood that the discriminatees would have continued working for the Respondent is not diminished or affected by the residences of the painters who actually worked for the Respondent in the absence of the discriminatees. In addition, the Respondent did not did not satisfy its burden of proof by showing that the discriminatees would not have held four of these six positions.

The Respondent also contends that the discriminatees would not have been employed after the Franklin Furnace project because either Respondent or the discriminatees would have terminated the employment relationship.[22] This argument assumes facts either not in evidence or not credited. First, there is no evidence in this case that the discriminatees would have terminated their employment relationship with the Respondent. Second, the only evidence that the Respondent may have terminated the employment relationship is from the testimony of Asman who based his conclusion on his asserted, but discredited, opinion of the discriminatees' abilities.

The Respondent claims that the backpay period should be no greater than the average length of employment of all of its painters. Alternatively, the Respondent argues that the statistics show there is no likelihood that the discriminatees would have worked beyond the end of the Franklin Furnace job. For example, the Respondent states that it employed 350 painters over the 5-year period from 1996 to 2001. Of those, only 2 worked throughout that period, 9 worked a portion of 5 years, 7 worked a portion of 4 years, 19 worked a portion of 3 years, 64 worked a portion of 2 years, and 249 worked only during a single year. Of painters residing

[21] R Brief, p. 9.
[22] R Brief, p. 10.

outside of Central Ohio, none worked more than 3 years, and only 28 worked more than a single year. An average of 7 painters worked all of each year during the period 1996–2001.[23]

The Respondent's statistical argument assumes that the discriminatees would have been motivated by the same employment considerations as motivated the Respondent's other painters, and that the discriminatees would have acted the same as the "average" painter (however that "average" painter is characterized) who has worked for the Respondent. The Respondent produced no evidence to show what factors motivated its other painters to leave their employment. The Respondent also produced no credible evidence to show that the discriminatees would have been motivated to quit their employment with the Respondent if they had not been fired. The fact that other painters may have left their employment with the Respondent after one, several, or many jobs does not prove that these discriminatees would have done the same. The mere fact that most of the Respondent's painters elected to end their employment with the Respondent after a period of time, in the absence of an explanation of why those painters acted as they did and that the same considerations apply to the discriminatees, does not prove that the discriminatees would have acted similarly. If the Respondent seeks to establish that the discriminatees would have acted the same as other painters it has employed, it was the Respondent's burden to prove that fact. The Respondent failed to do so.

The Respondent has no policy against hiring painters from outside the Central Ohio area. The Respondent's policy is to keep its painters working as long as each party desires that result. The Respondent had other work during and after the Franklin Furnace job, and it advised the discriminatees that it had plenty of work for them and would keep them working if they did a good job. The Respondent now seeks to disclaim and impeach this statement by its supervisor, but its own records support the statement that it did have work for them. The Respondent has not shown that it did not have, throughout the entire backpay period, jobs to which the discriminatees could have been transferred.

Robert Meade has been employed with a single employer since late 1996. At some unknown date before the hearing in this compliance proceeding, and possibly as early as 1996, Meade moved to Louisiana to continue working for this employer. The Respondent produced no evidence of any effort to obtain Meade's appearance at the hearing and he did not appear. The backpay due to Meade, as calculated by the compliance officer on a quarterly basis, is $10,598. If this backpay were calculated on a yearly rather than quarterly basis, as contended by the Respondent, the backpay would be $6,850.

The compliance officer was unable to locate Warren Hull. The last address the compliance officer had for Hull was from 1996–1997. Hull's backpay was calculated in the same manner as for the other three discriminatees, except that his interim earnings were the average of those discriminatees' interim earnings.

IV. Analysis

In compliance proceedings, the Board attempts to place the discriminatees, as nearly as possible, in the same financial position they would have enjoyed but for the illegal discrimination. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). A backpay award perforce involves some ambiguity and estimation, and therefore it is only an approximation, necessitated by the employer's wrongful conduct. *Cobb Mechanical Contractors*, 333 NLRB 1168 (2001), *quoting Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305

[23] R Exhs. 13 and 18.

(2d Cir. 1977). "The Board's well-settled policy is that '[a backpay] formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances.'…Further, it is also well-settled that any uncertainty in the evidence is to be resolved against the Respondent as the wrongdoer." Id. (citations omitted). The General Counsel bears the burden of proving the amount of gross backpay. The Respondent bears the burden of proving any reductions in gross backpay. *Florida Tile Co.*, 310 NLRB 609 (1993).

Although the General Counsel is allowed wide discretion in selecting a method of computing backpay, its selection need not be accepted if the Respondent proposes an alternate formula. Rather, the formula that produces the most accurate method of calculating backpay will be accepted. *Alaska Pulp Corp*., 326 NLRB 522, 523 (1998). Again, any uncertainty in the attempt to reconstruct backpay must be resolved against the Respondent and in favor of the discriminatees.

Employers in the construction industry are subject to the same rules and burdens of proof as employers in other industries, notwithstanding the Board's recognition of the distinctive employment practices in that industry. In *Dean General Contractors*, 285 NLRB 573 (1987), the Board stated, "Although we recognize that employment patterns in the construction industry have unique characteristics and jobs are frequently of short duration, these general characteristics, standing alone, do not justify a departure from our traditional make-whole remedy prior to compliance." The Board described the Respondent's burden as follows:

> If the Respondent establishes at compliance that [the discriminatee] likely would not have been transferred or reassigned elsewhere, the Respondent's obligation toward [the discriminatee] will be to consider him eligible for employment at future projects, on application, on a nondiscriminatory basis. Evidence pertaining to transfer or reassignment may be considered both concerning the Respondent's reinstatement obligation toward [the discriminatee] and the date when the Respondent's backpay liability to [the discriminatee] may have terminated.

285 NLRB at 575. Similarly, in *Laben Electric Co.*, 323 NLRB 428 (1997), the Board explained that the Respondent's burden of proof in a construction industry compliance proceeding was proof that the discriminatees would not have been transferred to other projects.

The Respondent did not prove that *these* discriminatees, Pratt, Hull, Meade, and Crisp, would not have been transferred to other projects. In fact, many of the painters on the Franklin Furnace job did transfer to the Respondent's other jobs. However, most of the Respondent's painters, in general, do not transfer to its other jobs throughout a full year, much less a period of years. Also, most of the painters who do transfer to other jobs are painters who live in the seven county area contiguous to Columbus, Ohio. (The discriminatees did not live in this area.) But these statistics merely reflect what the Board recognized in *Dean General Contractors* as the typical employment pattern in the construction industry. The statistics show that generally, with two exceptions, painters have not remained employed with the Respondent throughout the full five years encompassed in the backpay period. This employment pattern is not the result of a policy or practice of the Respondent to fire every painter after the completion of each job. On the contrary, the Respondent typically does transfer painters from one job to another. The Respondent's statistics merely reflect an employment pattern that is typical of the construction industry, and they are clearly not sufficient, standing alone, to meet the Respondent's burden to prove that these discriminatees would not have been transferred or reassigned to other jobs. *Dean General Contractors*, supra.

The General Counsel's method of calculating backpay uses earnings that the Respondent's painters would have earned if they had remained employed with the Respondent over the course of a full year. Such yearly earnings are then broken down quarterly from which quarterly interim earnings are deducted. *See F. W. Woolworth Co.*, supra. The Respondent's alternate method of calculating backpay would compare its painters' actual average earnings, without regard to such employees' actual length of employment, to arrive at what the discriminatees would have earned over a substantially longer amount of time. This alternate method is not a more accurate method of computing backpay. The Respondent's alternate contention that backpay should end at the completion of the job from which the discriminatees were fired is rejected for the reasons set forth in this decision, including the failure of the Respondent to prove that the discriminatees would have been terminated at the end of that job.

a. *Robert Meade*

The Respondent maintains that over the 5-year backpay period, Meade earned more than he would have earned if he had remained with the Respondent, and that backpay should not be awarded to Meade because it would result in a windfall to Meade. The Respondent cites *Ogle Protection Service*, 183 NLRB 682 (1970) as the only authority in support of this contention.

In *Ogle Protection Service*, the Board found that the *Woolworth* formula for awarding backpay did not apply where the loss suffered by the employees did not arise from or involve a cessation of employment status or interim earnings. In the present case, those are precisely the bases on which the discriminatees' backpay has been calculated. Accordingly, *Ogle Protection Service* is inapposite, and the General Counsel's calculation of backpay on a quarterly basis, consistent with *F. W. Woolworth Co.*, supra, is proper.

The Respondent also contends that Meade moved to Louisiana, possibly as early as 1996, and would not have been available to work for the Respondent since the time he moved. This claim is nothing more than a supposition by the Respondent. There is no evidence that Meade would not have returned if the Respondent had properly offered to reinstate him. The Respondent elected to wait over 5 years before offering to reinstate Meade. Certainly, the longer an employer waits before offering to reinstate a fired worker, the less likely it will be that the fired worker would be willing or able to accept the reinstatement offer. When the Respondent finally did send an offer of reinstatement to Meade on April 1, 2002, Meade did not reply and, effectively, declined the offer. The Respondent could have sent the reinstatement offer at any time before or during the extended proceedings in this case. Meade should not be penalized because the Respondent elected to wait absolutely as long as possible, thus helping to insure that the offer would not be accepted. Nor should Meade be penalized because he elected to take a job in another state with his employer, a job that eliminated much of the backpay that would otherwise be due, and which has redounded to the benefit of the Respondent. There is no evidence in this case that Meade would not have accepted a proper reinstatement offer at any time before April 1, 2002. Accordingly, the backpay due to Meade should not be reduced because he moved from the area in order to pursue employment.

b. *Warren Hull*

The Respondent maintains that because no representative of Region 9 of the Board has been in contact with Hull since 1996, and because there is no evidence that Hull made reasonable efforts to find interim employment, backpay should be denied. This claim misconstrues the respective burdens of the parties to this proceeding, and is rejected.

The Respondent bears the burden of proving any reductions in gross backpay. *Florida Tile Co.*, supra. Thus, the failure of proof cited by the Respondent was its own failure, not the General Counsel's.

The calculation of Hull's backpay was made in accordance with the Board's Casehandling Manual, Compliance Proceedings, section 10548.4. By using this section, rather than section 10621.7, the compliance officer gave the Respondent the benefit of backpay reduced by average interim earnings. The compliance officer was not required to give the Respondent this benefit. On the other hand, the Respondent claims that it is not liable for any backpay, and this claim is rejected. In *Starlite Cutting, Inc*., 284 NLRB 620 (1987), the Board set forth the procedure to be followed where a discriminatee has not been found. The backpay due to such discriminatee is to be placed in escrow with the appropriate Regional Director and is to be held for a period not exceeding 1 year.

c. *Charles Crisp*

When Crisp applied to the painters union, the union was accepting only apprentice applications. Accordingly, he accepted the apprenticeship, but he was never classified as an apprentice and was never paid as one. The Respondent paid Crisp at its journeyman rate, but contends that Crisp's backpay should be calculated at the apprentice rate. The Respondent contends that Crisp perpetrated a fraud on it by accepting pay at the journeyman level when, in fact, he was only an apprentice. This contention is rejected.

The Respondent failed to produce any evidence to show or explain the basis for its own decision to pay a painter at the journeyman level. There is no evidence to show that the Respondent's decision to pay Crisp at the journeyman level was improperly induced by Crisp or was otherwise inappropriate or contrary to company policy. The Respondent paid Crisp at the journeyman rate when it unlawfully fired him from his job. It paid him at the journeyman level based on its own criteria, and it has failed to articulate that criteria, much less demonstrate that Crisp's rate of pay was improper or that its decision was fraudulently induced by Crisp. Whether Crisp was a journeyman painter in the union local where he was a member is irrelevant without knowing what criteria the Respondent used in deciding to pay a painter at the journeyman level. The Respondent's contention that Crisp's backpay should be computed using the rate of pay for an apprentice is rejected.

Crisp failed to apply for a job with a prospective employer, BCI Construction and Engineering, Ltd., and he noted that the job was out of state. The evidence does not disclose in what state this prospective job was located. The evidence also fails to disclose the type of work involved, the pay, or any other conditions or qualifications of this prospective job. A discriminatee is not required to go beyond reasonable exertions in an effort to mitigate backpay liability. *Fabi Fashions, Inc*., 291 NLRB 586 (1988). In the absence of any evidence showing the nature or location of the prospective job with BCI, the Respondent has failed to meet its burden of proof that Crisp's failure to apply for the job demonstrates his failure to make reasonable exertions to mitigate.

d. *July 3, 2000 letters*

The Respondent contends that the July 3, 2000 letters to the discriminatees were valid, unconditional offers of reinstatement which should terminate the backpay period.

Backpay terminates or is tolled by a valid offer of reinstatement to a substantially equivalent position. *Holo-Chrome Co.*, 302 NLRB 452 (1991). A reinstatement offer to a discriminatee must be specific, unequivocal, and unconditional in order to toll backpay. Id. In *Holo-Chrome*, the Board concluded that a letter from the employer stating, "I want to talk with you [i.e., the discriminatee] regarding a job opportunity for which you are qualified," did not mention a specific job or job classification, and did not make an express offer of a job to the discriminatee. 302 NLRB at 454. Accordingly, the Board held that the letter did not end the backpay period. Similarly, the Respondent's July 3, 2000 letter did not mention a specific job or job classification, and did not make an express offer of a job.[24] Accordingly, the Respondent's July 3, 2000 letters did not end or toll the backpay period.

e. *April 1, 2002 letters*

By letters dated April 1, 2002, the Respondent offered to reinstate each of the discriminatees to their former jobs as journeyman painters. The General Counsel concedes, and I conclude, that these letters terminated the Respondent's backpay obligation to the discriminatees.[25] Accordingly, I find and conclude that the backpay period for the discriminatees covered the period January 2, 1996 to April 1, 2002.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, The Painting Company, Plain City, Ohio, its officers, agents, successors, and assigns, shall make whole the following discriminatees by paying them the following amounts, with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987):

David Dunn	$168
Rena Lawson	$168
Charles Crisp	$97,095

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[24] GC Exhs. 3 and 4. Because the July 3 letters so clearly fail to satisfy the requirements of a specific, unequivocal, and unconditional offer of employment that would toll backpay, I will not address the Respondent's actions in the timing and mailing of its letters. The letters are dated July 3, 2000, obviously the day before a major holiday in the United States. However, the letters were not postmarked by the United States Postal Service until July 5, 2000. The letters imposed a deadline of July 7 for reply. Nor need I consider the Respondent's statement to Pratt that the Respondent did not have prevailing wage work available to Pratt and that the job referred to in the letter paid between $7 and $8 per hour.

[25] The General Counsel properly could have advocated a backpay ending date of May 1, 2002 because the offer of reinstatement afforded the discriminatees 30 days within which to make their decision. *Eastern Die Co.*, 142 NLRB 601 (1963). However, I cannot say that the decision to advocate an ending date of April 1 was improper or that it results in an injustice under the circumstances of this case.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Robert Meade	$10,598
Mark Pratt	$75,694

IT IS FURTHER ORDERED that the Respondent place in escrow with the Regional Director for Region 9 of the National Labor Relations Board for a period of 1 year[27] the following amount for the following discriminatee:

Warren Hull	$30,201

Dated, Washington, D.C. September 8, 2003

_____
Joseph Gontram
Administrative Law Judge

[27] The 1-year period begins with the Respondent's payment of the backpay for deposit into escrow or the date the Board's Supplemental Decision and Order becomes final, including enforcement, whichever is later. *Starlite Cutting, Inc*., supra.